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GENERAL TENDENCIES IN STATE CONSTITUTIONS[1]

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Throughout classical and medieval philosophizing runs a theory of a paramount or fundamental law, permanent in kind, because fixed in nature. This theory in its modern form, after voicing itself for a time in the Cromwellian period, came to the front in the American Revolution and found its proper expression in the written constitution. In our federal system, owing to the rigidity of the national Constitution, the development of that document must be traced in the varying decisions of the Supreme Court of the United States. In the Commonwealths a more flexible system of amendment prevails, and for that reason changes in what the States consider to be their fundamental law, may be traced more easily in the constitutions themselves, subject as they are to frequent revision and amendment.

In the Revolutionary period these constitutions were few in number, small in size, and contained a mere framework of governmental organization. Since that time some two hundred State constitutions have been made or revised. The forty-five now in force average in length over fifteen thousand words, the longest, that of Louisiana, having about forty-five thousand. In place of fundamentals only, they are filled with details, so petty in many

[1] This study constitutes one of a series of nine articles dealing comparatively with our State constitutions. The entire series is to be published in March, 1907, as a monograph by the American Academy of Political and Social Science.

instances, as hardly worthy even to be dignified as statutory.

This tendency to enlargement is not without justification. The proper solution of problems arising from the complexity of modern interests, demands more wisdom and knowledge than is usually found in legislatures, which are often incompetent and sometimes venal. The democratic demand for legislation through convention, is really a demand for legislators of a higher grade. To legislatures in consequence are left the mere details of legislation with a minimum of discretion in the formulation of statutes. Their ability in this sort of thing is well seen in the biennial output by the States of nearly twenty thousand statutes, three-fifths of which are local, private, or special in kind.

Our present State constitutions represent different stages of development and may be divided into four sets: (1) the six New England constitutions, (2) the ten made during the twenty-five years ending with 1865, (3) the fourteen made from that date up to 1886, and (4) the fifteen new and revised constitutions of the last twenty years. Three more will probably be added to this number within the next twelve months[2] and an average of one per year may be expected from that time on. The process of amendment, through which about twenty additions are made annually to our constitutions, tends to modernize all of these.

A comparison of these sets shows that the starting point for the study of State constitutions is the article on the lawmaking department. This powerful body in Revolutionary days completely overshadowed the other two departments and was practically the repository of

[2] Oklahoma, Michigan, and possibly Iowa.

the sovereign powers of the State. Though the theory of the separation of powers was held, all really important powers were in fact entrusted to the legislature. This is by no means the present condition. Not only have the other two departments been built up and strengthened at the expense of the assembly, but three other departments of government have developed into importance, and should be considered in any discussion of the division of sovereign powers. If the government is that organization through which all the sovereign powers of the State may be expressed, then surely in modern times we should speak not merely of the three historic departments of government, viz: the executive, the judicial, and the legislative, but also of the differentiations from these, the administration, the electorate, and that nameless agency which in every State has the legal right to formulate the fundamental law, an agency which, for want of a better name, may be called the *legal sovereign*. These six departments unitedly may exercise every conceivable power included within the term sovereignty.

The general tendency in regard to these six departments of government, as shown by our existing constitutions, will be indicated in order, and then attention directed to the lengthy series of limitations placed on the exercise of other powers not removed from legislative discretion.

I. *Administration.* Historically administration is of course part of the executive function, but in our Revolutionary period it was at first controlled, and in part carried on, by the legislatures. This was done through committees, temporary and then permanent. The work performed by these was gradually transferred to paid officials, who, as functions became specialized, were organized

for the purpose of carrying on the work of administration, into the numerous boards, commissions, and departments of government. Most of our States are still in this stage of development. Every new line of activity results in the formation of a special board or department, the organization and powers of which are frequently defined in the constitution. This also regularly provides for the election by popular vote of the heads of the chief administrative departments, such as the secretaries of state and of the treasury, the comptroller or auditor, and the superintendent of education. As these numerous boards and departments really perform the larger part of governmental business, it is surely advisable that the several articles and provisions of the constitution be gathered together and placed under a separate heading, entitled Departments of Administration. Their functions also should be coördinated, unified and thoroughly supervised. The absence of such centralization is perhaps the greatest weakness in local administration. Supervisory control over such bodies by legislative committees tends to become merely nominal, with the inevitable consequences of inefficiency and lack of economy. There is, however, a strong tendency to center such powers in the executive, making him the head of the administration as in the national system. This is done by bestowing on him large powers of appointment and removal, authority to demand reports, and to investigate the management of departments.

II. *The Executive.* Aside from control over administration, the chief gain in power on the part of the executive is his veto over legislation. In 1788 two States only[3] had placed the veto power in their constitutions: at this

[3] Mass., N. Y.

time but two States withhold it.[4] Thirty-one States adopt the national fraction of two-thirds of both Houses to over-ride the veto, the other twelve prefer a majority or three-fifths. Thirty States now allow the governor to veto items of appropriation bills, and three of these also allow him to veto part or parts of any bill.[5] If adjournment intervenes between the sending of a bill to the governor and its return approved or vetoed, ten States allow the governor a period of from three to thirty days to decide whether or not to approve such bills. Eighteen States allow him to file objections with the secretary of state, thereby defeating the bill. The veto power, especially when strengthened by the power to veto items and to approve or disapprove after adjournment, has aided greatly in the enlargement of the importance of the executive and in the conservation of public interests.

The governor's term of office is four years in twenty-one States, two years in the same number, three in New Jersey and one year in Massachusetts and Rhode Island. The office of lieutenant governor is still retained in thirty-two of the States. He presides over the senate in thirty of these. In Massachusetts and in Rhode Island, he is a member of the council, or of the senate, *ex officio*, but presides only in the absence of the governor, who by the constitution is presiding officer. The old fashioned executive council is still retained by three of the New England States,[6] and there is a modified form of it in North Carolina. Iowa, by statute, has an executive council made up of the governor and the heads of three departments.

III. *The Judiciary Department.* The older constitu-

[4] N. C., R. I.
[5] Wash., Va., Ohio.
[6] Mass., N. H., Me.

tions disposed of this department in few words. Discretionary power was conferred on the legislature, and judges, appointed by governor or legislature, usually held a life tenure. The newer constitutions completely reverse this practice. The courts in the United States do not simply decide cases, they interpret finally the constitution, and to that extent are a political factor. For this reason complex business conditions and the rise of corporate interests necessitate much more attention to this department of government. The Constitution of Louisiana, for instance, devotes about twelve thousand words to the courts of the State and of the city and parish of New Orleans. The newer constitutions regularly outline the grades of courts, define their powers, set the boundaries for judicial districts, and regulate the number and tenure of the judiciary. Three of the original States[7] still retain a life tenure, but all others fix a term of years for judges of the supreme court: the term varies from two to twenty-one years. Twenty States favor the six-year term, eight and twelve years being the terms next favored. Three States have long terms,[8] and Vermont a two-year tenure. Six States only retain appointment through the governor aided by council or senate.[9] Four choose through the legislature,[10] and one (Connecticut) nominates through the governor and elects through the assembly. The other States all elect their judiciary and show no tendency in the other direction. Four of the New England States still allow the governor or assembly to ask the supreme court for opinions on questions of law. South Dakota and Florida allow the governor this privilege,

[7] Mass., N. H., R. I.
[8] Pa. 21 years, Md. 15 years, N. Y. 14 years.
[9] Me., Mass., N. H., and Del., Miss., N. J.
[10] R. I., Vt., S. C., Va.

but all the other States with greater wisdom reject this provision. There is a marked tendency in the constitutions to merge law and equity into a common procedure, to modify the jury, to define libel, and to safeguard the exercise of eminent domain by quasi-public corporations. All these tendencies unitedly show a strong determination to make the judicial system responsible directly to the electorate.

IV. *The Constitutional Convention.* The modern theory of a fundamental law, and its embodiment in the written constitution, have necessitated the development of a governmental agency for the express purpose of formulating the fundamental law. Two forms of this agency are in use among the States, the legislature and the convention. (1) The legislature in the performance of this office is not properly a legislature, but a convention. This is shown by the fact that its recommendations are not sent to the governor for his approval or veto, but to the electorate for final decision. The older method of amendment was through the action of two assemblies and large fractional votes by assembly and electorate. At the present time action by one assembly is sufficient in twenty-six States. Eighteen still require two assemblies, and the remaining State (New Hampshire) amends only in convention. All but Delaware use the referendum for final decision. Seventeen of the constitutions still require a two-thirds vote of both houses on amendments: seven, a three-fifths vote; in sixteen a majority is sufficient. Only two States require more than a majority for referenda, Rhode Island (three-fifths), and New Hampshire (two-thirds). The usual requirement, that of twenty-eight States, is "a majority of those voting thereon," but a few make amendment well nigh impossible by requiring a

majority of the electors, or a majority of those voting at a general election.

(2) Few seem to realize the importance of the constitutional convention in American State governments. It is the great agency through which democracy finds expression. In its latest form, that of a body made up of delegates elected from districts of equal population, it is one of the greatest of our political inventions. Through it popular rights may be secured in the constitution, legislative tyranny restrained, and powerful interests subordinated to the general welfare. Not that these objects have as yet been attained, but the agency is here through which an enlightened public opinion can express itself.

All but thirteen of the States expressly provide for the calling of a convention. In twelve of the thirteen, conventions can be called under legislative authority. In one State only (Rhode Island) is there doubt about the matter. Its supreme court in 1883, when requested by the senate for an opinion, in its reply concluded that under the Constitution a convention could not be called. Judge Jameson, however, in his great work on Constitutional Conventions,[11] in discussing this opinion reaches the opposite conclusion. If the composition of the convention is mentioned at all in the constitution, the usual provision is that it be made up of representatives from districts of equal population. There are, however, a few exceptions. Since the year 1890, under the older theory that the convention is the repository of sovereign powers, five constitutions have been promulgated by conventions without referendum.[12] To check this possibility, fourteen constitutions expressly require the referendum, and the other States would likely do so by statute.

[11] 4th ed., pp. 601–615.

[12] Miss., S. C., Del., La., Va.

V. *The Electorate.* If this body, instead of being referred to as the "sovereign people," should be treated, from the legal standpoint at any rate, as a governmental agency, clearness in discussion would be gained. Under the constitutions this governmental agency has three sets of powers. (1) The power of appointment to certain offices through elections; (2) the power to assist in law-making through the referendum and to some extent through the initiative; and (3) the power to assist in judicial decisions through service on jury. These powers are steadily increasing through the agency of the convention. The chief officials of the State and municipality, the law makers of all grades, and judges supreme and inferior, are now regularly elected by popular vote. The verdicts of juries now are often made by a fraction of the whole instead of by unanimous vote. The referendum is generally required for final decisions on fundamental law, and very largely on local and general statutes. The most remarkable development of this power may be found in the Constitution of Oregon since its amendment in 1902. By this, the power of initiative and referendum is fully secured to the electorate, both in statutory and constitutional provisions. These powers of the electorate are plainly specified in the constitutions and are clearly governmental in kind, as truly so as any other of the agencies of the State.

The usual basis for membership in the electorate is that they be male citizens of the United States at least twenty-one years of age. Nine States still allow aliens to vote who have declared their intention to become citizens, four States grant suffrage to women, eight States have a slight educational qualification, six other States have an educational qualification as one of several alternatives,

and three of these introduce a property qualification as an alternative, but otherwise, this historic restriction survives only in Rhode Island, in the election of members of city councils.

VI. *The Legislature or General Assembly.* The Revolutionary constitutions differed widely in respect to the organization and membership of their legislatures. Very noticeable, however, is the present tendency to approximate a common type. In all the States the legislature is bicameral. Thirty-eight States elect the members of the house biennially; senators have a four-year term in twenty-nine States, and twenty-four provide for a system of class rotation in the senate. A biennial session is required in thirty-eight States, and thirty-one fix actually or practically a time limit for legislative sessions: this in eighteen States is fixed at sixty days. The membership of the State legislatures is unitedly about seven thousand, but nearly two thousand of these are found in the seven[13] States that have assemblies of over two hundred members. The size of the membership in each house naturally varies with the population of the State, but if the seven mentioned above be omitted, the general average is a membership of about thirty-five in the senate and ninety in the house. The house membership is regularly from two to three times that of the senate.

In seventeen States the membership of both houses is made up of representatives from districts of equal population. In nineteen other States there is a requirement that a locality, either county or town, be represented in one or both houses. In these States however, the requirement modifies only slightly the principle of popular representation, and the districts are practically of equal pop-

[13] Ill., Ga., Pa., Mass., Vt., Conn., N. H.

ulation. In other words, thirty-six of the States make their legislative houses popular in basis. The nine other States depart from this principle by requiring a disproportionate representation for their rural towns, or counties of small population. The worst offenders in this respect are Delaware, Maryland, Vermont, Connecticut and Rhode Island.

Limitations on Legislatures. Under the National Constitution the powers not delegated to the federation nor prohibited to the States are reserved to the States. This reserved power may be exercised in each State by its legislature, unless the local constitution re-delegates part of this power to the other departments of government, and places restrictions and prohibitions on legislative use of the remainder.

One would think that since our legislators usually come from districts of equal population they would by constitution be entrusted with large discretionary powers in legislation. This, however, is far from being the fact. There is a steadily increasing tendency to restrict in every possible way the enormous powers of legislatures. In general the length of a constitution indicates the amount of restriction placed on lawmaking. Every provision in a bill of rights limits by so much legislative initiative. The rapidly increasing powers of the executive and the electorate in appointment, administration, and lawmaking are all at the expense of the assembly; the growth in importance of the constitutional convention subordinates proportionately its rival—the legislature. Every article in the constitution that fixes the organization and powers of a department of administration, or division of government, or defines a policy in regard to important interests, is to that extent a restriction on legislative discretion.

Yet in the newer constitutions one may expect to find, as already indicated, lengthy articles on the judicial and administrative departments, and, moreover, much regulation of taxation, finance, local government, education, elections and the suffrage, land, mines, corporate interests and labor. To these regulations should be added long lists of prohibitions, such as those against special or local legislation, and numerous regulations of procedure in respect to the handling of bills. Subtract all these limitations on legislative powers from the totality, and the question may then well arise whether it will ultimately prove worth while to retain an expensive legislature to exercise its small residue of petty powers. A convention meeting periodically, and well supervised administrative departments with ordinance powers, might perform all legislative functions to entire satisfaction.

It seems plain that the really important lawmaking body at the present time is the convention. Its members are of a higher grade and turn out work distinctly superior to that of legislatures. These, in fact, are bodies having chiefly ordinance powers. Whenever, through sudden changes in conditions, a legislature unexpectedly develops large discretionary power in statute-making, the next convention in that State settles the principle itself and thereby adds another limitation to legislative initiative. If this tendency continues, the biennial session will become quadrennial, the term be limited to forty or sixty days, and every inducement offered our legislators to do as little and to adjourn as speedily as possible. On the other hand if our States can make improvements in the legislative system, and select a better grade of legislators, our lawmaking might continue to be entrusted to legislatures, whose members, as the early constitutions of

Maryland and Vermont put it, should be persons "most wise, sensible, and discreet," and "most noted for wisdom and virtue."

In conclusion, attention may well be called to the practical disappearance from our constitutions of some old time provisions. Among these may be mentioned the annual election, and the annual session, the governor's council, and unequal representation of the people in law-making bodies, the life tenure of judges, and the advisory capacity of the supreme court. Religious restrictions on office-holding, and the property qualification for suffrage, with very slight exceptions, have gone; the town system of New England is dying in that section and does not exist outside of it. The real local units of administration now are, (1) the rural county with its numerous subdivisions, and (2) the incorporated city, both of which are gaining power throughout the United States.

If general tendencies in the making of constitutions may be condensed into a sentence, we may say that governmental powers are centering in the electorate, which voices itself through the ballot and the convention.